IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1559

HALBERT D. BROOKS,

Petitioner,

v.

THE WASHINGTON TERMINAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES R. SCULLEN
1701 Pennsylvania Avenue, N.W.
Suite 208
Washington, D.C. 20006
(202) 298-6608
Attorney for Petitioner

Washington, D.C. • THIEL PRESS • (202) 638-4521

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The Petitioner, Halbert D. Brooks, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review its judgment in the above entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported. A copy of the opinion appears in Appendix E of this petition.

A copy of the Judgment and Memorandum Opinion in support thereof dated November 21, 1977, issued by the United States District Court for the District of Columbia and Opposition thereto is filed in Appendix C.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

This case invokes rights claimed under a statute of the United States known as the Federal Employers Liability Act cited at Title 45 U.S.C. Section 1-51, *et seq.*

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on January 17, 1979.

QUESTION PRESENTED

Did the trial court err when it refused to enter $80,000.00 jury verdict in favor of petitioner, granting respondent's renewed motion for directed judgment and were the actions of the Courts below consonant with the statutory mandate enacted by the Congress of the United States under Title 45 U.S.C. Section 51, *et seq.*, and the numerous cases decided to the contrary by this Court from 1930 to the present?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides in pertinent part as follows:

> "in Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law."

The applicable statutory provisions involved, herein, are the Federal Employers Liability Act, Sec. 1, *et seq.*, as amended, 45 U.S.C.A. Sec. 51, *et seq.*, which reads in pertinent part as follows:

> "every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and foreign nation or nations, shall be liable in damages to any persons suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, *for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier* or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wars, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely insubstantially, effect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Supreme Court Rule 19 dealing with considerations governing review on certiorari reads in pertinent part as follows:

"1. A review on writ of certiorari is not a matter or right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

"(b). Where a Court of Appeals has rendered a decision then . . . ; *or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.*"

STATEMENT OF THE CASE

Petitioner, Halbert D. Brooks, age 60, was respondent railroad's top supervisor on the midnight trick of duty on the 10th day of June, 1975.

Petitioner had thirty-three years railroading experience, rising from a seat changer to head supervisor.

On June 10, 1975, about 5:45 a.m. he was viciously assaulted by a new railroad employee, one Daryl Garnett, age 19 years, with a railroad tool called a soft end hose.

Garnett's immediate supervisor, James Deal, testified the assailant had been missing from his assignments from 1:00 a.m. until the time of the assault and no action was taken by anyone, including security, to ascertain his whereabouts when Petitioner had to confront and discipline his subordinate for failure to perform his duties.

The assailant had violated a company Rule G, having narcotics in his possession, and he was subsequently discharged by the respondent railroad.

The respondent railroad also told Petitioner they had no duty to protect him from this criminal assault under the Federal Employers Liability Act.

The trial court, after preparing written interrogatories to the jury, submitted the case to the jury. After four hours deliberation, the jury returned a verdict in favor of Petitioner in the sum of $80,000.00. The trial court refused to enter judgment and granted respondent railroad renewed motion for a directed judgment, stating if the case had been in such posture, it would also have granted a Motion N.O.V.

The United States Court of Appeals for the District of Columbia Circuit affirmed the action of the trial court, stating Petitioner failed to produce sufficient evidence of "indirect" or "direct" negligence; failed to prove a "prior disregard" of the violation of company Rule G in order to make the violation here effective; and failed to show forseeability for the propensity for violence upon the part of the assailant. *Forseeability of danger apparently was not enough. The jury, with reason, thought otherwise!* Neither court elected to discuss the doctrine of a safe place to work except inferentially in Note 6 in the Court of Appeals opinion, page 7. Neither court discussed the breakdown in security which formed a theory of Plaintiff's complaint. See paragraph 10 of Plaintiff's complaint.

At any rate the logical inference the jury drew from the facts stated in Note 6, page 7 of the Appellate Opinion, was singularly their function, not the court's.

Neither of the courts below concerned themselves with the simple statutory criterion of whether the company's

negligence contributed, in whole or part, to Plaintiff's injuries.

Both courts took great pains to weave a tortuous, legal path to circumvent that simple criterion, utilizing *novel* concepts of negligence not found in the cases decided by this Court; *novel* concepts of rule violations as they relate to respondent's culpability, and formulation of a *novel* definition of forseeability also remarkable for its restrictiveness and dissonance from prior defintions issued by this Court on numerous occasions.

REASONS FOR GRANTING THE WRIT

1. The decisions below raise serious questions regarding the administration of justice in the Federal System under an act entitled the Federal Employers Liability Act and amendments thereto cited at Title 45 U.S. Code Section 1-51, *et seq. Jamison v. Encarnacion,* 381 U.S. 642, 643 (1930).

2. The District and Circuit Courts for the District of Columbia *have usurped the function of the jury under the Federal Employers Liability Act* when they deprived an injured railroad supervisor of his jury verdict of $80,000.00. *Harrison v. Missouri Pacific Railroad Company,* 372 U.S. 248 (1963).

3. The decisions below recognize but refuse to apply the doctrines enunciated by this Court in *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957); *Bailey v. Central Vermont Railway, Inc.,* 319 U.S. 350, 353, 354, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943); *Lillie v. Thompson,* 332 U.S. 459, 68 S.Ct. 140 (1947); *Harrison v. Missouri Pacific Railroad Company,* 372 U.S. 248 (1963).

4. The decisions below circumvent the Seventh Amendment of the Constitution of the United States, the Federal Employers Liability Act and amendments thereto and a host of cases decided by this Court. *Tiller v. Atlantic Coast Line,* 318 U.S. 54 (1943); *Anderson v. Atchison Topeka & Santa Fe Railroad Company,* 333 U.S. 821 (1948); *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326 (1958).

5. The decisions below ingeniously extract arbitrary classifications of *indirect* and *direct negligence* from legal treatises to construct legal barriers which deny relief to injured railroad supervisors when such classifications are mere devices to reinstate common law defenses which have been obliterated from the act by statute and decisions of this Court. *Kernan v. American Dredging,* 355 U.S. 426 (1957); *Gallick v. B & O Railroad Company,* 372 U.S. 108, 113-114 (1963); *Jamison v. Encarnacion,* 281 U.S. 642, 643 (1930); *Tiller v. Atlantic Coast Line Railroad Company,* 318 U.S. 54 (1943).

6. The decisions below are replete with recognition of established doctrines in Federal Employers Liability Act cases but devoid of a desire to apply such doctrines. *They seek to obliterate the doctrines established by this Court. Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500, 506, 77 S.Ct. 448, 1 L.Ed.2d 493 (1957); *Tennant v. Peoria & Pacific Union Railroad Company,* 321 U.S. 29, 35 (1944); *Tiller v. Atlantic Coast Line Railroad Company,* 318 U.S. 54 (1943); *Bailey v. Central Vermont Railway, Inc.,* 319 U.S. 350, 353, 354, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943).

7. The decisions of the court below *illegally attempt to exclude a class of railroad workers from relief under the act,* i.e., *railroad supervisors assaulted by their subordinates by establishing novel standards of negligence not found in the Federal Employers Liability Act or amendments thereto or in cases decided by this court.*

Railroad supervisors would never be able to demonstrate that an assault by a subordinate was in furtherance of the railroad's business. Yet, the Courts below require this burden of proof under the novel negligence concept of *indirect negligence. Harrison v. Missouri Pacific Railroad Company,* 372 U.S. 248 (1963); *Lillie v. Thompson,* 332 U.S. 459, 68 S.Ct. 140 (1947); *Lavender v. Kurn,* 327 U.S. 645 (1946).

8. The rationale of the courts below, in assault cases brought under the Federal Employers Liability Act and amendments thereto, impermissively redefine forseeability for a propensity for violence contrary to the decisions of this Court. If permitted to stand, confusion will supplant reason in all federal circuits deciding assault cases brought under the Federal Employers Liability Act. *Harrison v. Missouri Pacific Railroad Company,* 372 U.S. 248 (1963); *Lillie v. Thompson,* 332 U.S. 459, 68 S.Ct. 140 (1947).

9. There was ample evidence of negligence in the record to support the jury verdict in favor of the Petitioner, an assaulted railroad supervisor, who was attempting to carry out the mandate of the Federal Employers Liability Act, i.e., protect all railroad employees and the public when he was viciously assaulted.

Sensing a philosophical abandonment of the railroad worker in this Court by benign neglect, the courts below have decided to begin anew a frontal attack on doctrines established in this Court since Jamison v. Encarnacion, 281 U.S. 642, 643 (1930); *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957).

10. The courts below hold that the burden of proof *by railroad supervisors* assaulted by subordinate employees, through no fault of their own, and engaged in the very act of supervision, *is greater under the remedial humanitarian Federal Employers Liability Act and*

amendments thereto than at common law, contrary to what this Court has reiterated since the enactment of the act. *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326 (1958); *Najera v. Southern Pacific Company,* 13 Cal. Rptr. 146 (1961).

CONCLUSION

The jury's verdict in Federal Employers Liability Act cases, has, until now, been inviolate.

This Court has so stated time and again, and in conjunction with the Seventh Amendment of the United States Constitution, has provided injured railroad men, *including supervisors* whose devotion to duty to the railroad, fellow employees, and the public leave them singularly exposed to bodily harm, intentional or otherwise, with a humanitarian remedy.

Although there was ample evidence of negligence from which the jury might impute negligence to the carrier, the opinions below, sensing an abandonment of the stewardship in these railroad cases, assert to Petitioner that his final reward for thirty-three faithful years as a railroad man, from seat changer to number one supervisor, is that he has no remedy for a savage beating with a railroad tool by his subordinate employee supplied to him by the railroad.

The Congress of the United States and decisions of this Court have indicated no such bizarre and inhumane result should ensue.

Petitioner respectfully asserts that his petition for certiorari should be granted and the judgments below be summarily reversed as discordant with many prior decisions of this Court.

Respectfully submitted,

JAMES R. SCULLEN
1701 Pennsylvania Avenue, N.W.
Suite 208
Washington, D.C. 20006
(202) 298-6608
Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0073

HALBERT D. BROOKS
408 Oglethorpe Street, N.E.
Washington, D.C. 20011

Plaintiff,

vs.

WASHINGTON TERMINAL COMPANY
Union Station
Washington, D.C.

Defendant.

COMPLAINT FOR PERSONAL INJURIES UNDER FEDERAL EMPLOYEES LIABILITYACT

The plaintiff, Halbert D. Brooks, a railroad worker for thirty-eight (38) years, a resident of the District of Columbia, states in support of his claim as follows:

1. This action arises under an Act of Congess, known as the Federal Employers Liability Act, and amendments thereto cited as Title 45, United States Code, Section 51 et sequentia.

2. The plaintiff was, at the time of the occurrence, a railroad car foreman and night supervisor, employed by the defendant company, engaged in interstate commerce, and he was injured in the course and scope of his employment.

3. The defendant is a Class I railroad corporation, engaged in interstate commerce, incorporated under the laws of the District of Columbia.

4. At the time and place hereinafter mentioned, the acts of omission and commission causing injury to the plaintiff were by the agents, servants and or employees of the defendant, acting in the course and scope of their employment and were due in no manner whatsoever to any act or failure to act upon the part of the plaintiff.

5. All of the property, equipment and operations involved in the occurrence were under the direct and exclusive control of the defendant.

6. As a result of the accident herein referred to, the plaintiff has been obliged to expend, in an effort to cure himself of the pain and injuries hereinafter more particularly set forth, various sums of money for medicine and medical treatment and will be obliged to continue to expend such sums for the remainder of his life.

7. Because of the accident herein referred to, the plaintiff has undergone great physical pain and mental anguish and will continue to endure same for the remainder of his life, to his great detriment and loss.

8. As a result of the accident herein referred to, the plaintiff has suffered a loss and depreciation of his earning power and will continue to suffer such loss and depreciation for the remainder of his life, to his great detriment and loss.

9. About 5:45 a.m., June 10, 1975, plaintiff was assaulted by an employee of the defendant company. Both the plaintiff and the employee were engaged in work for the defendant at the time of the occurrence. Plaintiff asserts that acting as supervisor for the defend-

ant, he ordered an employee, one Daryl Garnett, to stop work and leave the premises at 5:45 a.m. between platform 25 and 26 tracks, and the employee maliciously and savagely attacked him. Plaintiff asserts such attack was unprovoked and he was struck by the employee who was holding a hose with a metallic end in his hand, causing plaintiff severe and permanent injuries.

10. *Plaintiff further alleges that the defendant railroad was negligent toward him and that such negligence, in whole or in part, contributed to his injuries in that the defendant railroad: failed to provide him with a safe place to work; employed a person who they knew, or with reasonable care should have known, had dangerous propensities to commit illegal and dangerous acts; failed to promulgate and enforce its safety rules; failed to provide adequate and continuous medical care which aggravated his injuries; failed to provide him adequate security to perform his supervisory duties and did in other ways act in a grossly negligent manner towards him which will be presented more fully on the trial of this cause.*

WHEREFORE, plaintiff demands compensatory damages against the defendant, The Washington Terminal Company, in the sum of Two Hundred Thousand Dollars.

Plaintiff demands punitive damages against the defendant in the sum of Five Hundred Thousand Dollars.

JAMES R. SCULLEN
Attorney for Plaintiff
1701 Pennsylvania Ave., N.W.
#208
Washington, D.C. 20006

Plaintiff demands trial by Jury.

JAMES R. SCULLEN

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0073

HALBERT D. BROOKS

Plaintiff,

vs.

WASHINGTON TERMINAL COMPANY

Defendant.

VERDICT SHEET

1. Do you find by a fair preponderance of the evidence the defendant, Washington Terminal Company, was negligent in its hiring of Mr. Garnett, in failing to maintain a reasonably safe place in which its employees worked, or in failing to warn its employees of the alleged propensities of Mr. Garnett, that any of said negligence caused, in whole or in part, any foreseeable injury to the plaintiff?

   Yes X No____

2. Do you find by a fair preponderance of the evidence that Mr. Garnett, an employee of the defendant at the time in question, assaulted the plaintiff while acting in the course of the discharge of his duties and in the furtherance of the work of his employer's business, and that such acts caused, in whole or in part, any injury to the plaintiff?

   Yes X No ____

IF YOUR ANSWER TO EITHER QUESTION 1 OR 2 IS YES, YOU MUST THEN GO ON TO ANSWER QUESTION 3. IF YOUR ANSWERS TO BOTH QUESTIONS 1 AND 2 ARE NO, THEN YOUR JOB IS COMPLETED AND YOU SHOULD SO INDICATE BY PLACING AN "X" AFTER THE SENTENCE IMMEDIATELY BELOW:

We the jury find for the defendant ____.

3. If you answered yes to either question 1 or 2, what is the amount of damages, if any, you find to have been caused, in whole or in part, by the defendant?

   $ 80,000

/s/ Ms. Juanita Price
Jury Foreperson

Date:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0073

HALBERT D. BROOKS
408 Oglethorpe Street, N.E.
Washington, D.C. 20011

Plaintiff,

vs.

WASHINGTON TERMINAL COMPANY
Union Station
Washington, D.C.

Defendant.

ORDER

Upon consideration of the jury verdict rendered herein on October 20, 1977 (judgment thereon having not been entered pursuant to the direction of the Court), and upon consideration of defendant's renewed motion for a directed verdict, and for the entry of a judgment in its favor and upon consideration thereof, including plaintiff's opposition thereto, and in accordance with the Memorandum Opinion issued of even date herewith, it is, by the Court, this 21st day of November, 1977,

ORDERED, that the defendant's renewed motion for a directed verdict be, and the same hereby is, granted; and it is

FURTHER ORDERED, that a judgment in favor of the defendant dismissing the complaint be, and the same hereby is, entered; and it is

FURTHER ORDERED, that each party shall bear its own costs of this litigation.

/s/ Charles R. Richey

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0073

HALBERT D. BROOKS
408 Oglethorpe Street, N.E.
Washington, D.C. 20011

Plaintiff,

vs.

WASHINGTON TERMINAL COMPANY
Union Station
Washington, D.C.

Defendant.

MEMORANDUM OPINION OF UNITED STATES DISTICT JUDGE CHARLES R. RICHEY

This case, brought under the provisions of the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*, was tried before a jury on October 19 and 20, 1977. At the conclusion of the plaintiff's case, and again at the conclusion of all the evidence, the defendant moved for a directed verdict pursuant to the provisions of Rule 50, Federal Rules of Civil Procedure, said motions being denied by the Court, without prejudice. After instructions and deliberations, the jury, on October 20, rendered a verdict in favor of the plaintiff on the basis of written interrogations in the amount of $80,000.00. Pursuant to the provisions of Rule 58, Federal Rules of Civil Procedure, judgment *was not* entered upon the verdict, the Clerk being directed by the Court to withhold entry of judgment until futher Order of the Court.

In view of the above, and pursuant to leave granted the defendant upon return of the verdict by the jury, the case is now before the Court upon the defendant's renewed motion for entry of a directed verdict in its favor. The defendant has also moved that the verdict rendered by the jury be set aside and, in the alternative, for a new trial. For the reasons hereinafter stated, in view of the fact that the Court erroneously denied, without prejudice, the defendant's motion for a directed verdict at the close of the plaintiff's case and since no judgment has been entered, the Court finds it unnecessary to rule on the defendant's motions for a judgment notwithstanding the verdict and for a new trial, and will direct the Clerk to enter judgment for the defendant.

I. BACKGROUND AND ESSENTIAL FACTS

Plaintiff brought this case under the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*, seeking damages for injuries caused by an assault upon the plaintiff by one Daryl Garnett, a former employee of the defendant. The case proceeded to trial on October 19 and 20, 1977, before the Court sitting with a jury. In short, the evidence indicated that the plaintiff, while employed as a supervisor for the defendant, reprimanded Mr. Garnett for sleeping on the job and told him to punch his time card such that he would lose some three and one-half hours pay. Mr. Garnett then hit the plaintiff with a "soft-end," an instrument used in the railroad business. The plaintiff was treated at a nearby hospital while Mr. Garnett was being arrested. A quantity of what appeared to be marijuana was found on Mr. Garnett's person. He was subsequently fired by the defendant.

The jury then returned a verdict of $80,000.00 for the plaintiff. This might be said to not be surprising in

that the plaintiff was a good witness who aroused sympathy. However, sympathetic justice does not provide the basis for a claim of liability. Nevertheless, the jury obviously overlooked and disregarded both the evidence and the law here.

The Federal Employers' Liability Act makes a railroad liable in damages to a plaintiff for injuries sustained by him while he was employed by the defendant if such injury resulted, in whole or in part, from the negligence of any officers, agents, or employees of the defendant. 45 U.S.C. §51. The Act imposes liability only for negligent injuries; it does not make the railroad an absolute insurer for personal injuries suffered by its employees. *Wilkerson v. McCarthy*, 336 U.S. 53 (1945).

II. MOTION FOR A DIRECTED VERDICT

Plaintiff bases his claim herein upon two theories of liability under the Federal Employers Liability Act (FELA). First, the plaintiff alleges that the assault upon him was committed in the course of the discharge of Mr. Garnett's duties, and, in the furtherance of the work of the defendant's business. *See Slaughter v. Atlantic Coast Line Railroad Co.*, 302 F. 2d 912 (D.C . Cir.), *cert. denied*, 371 U.S. 827 (1962). The second theory that the plaintiff relies upon is that the defendant was negligent (a) in hiring Mr. Garnett, (2) in failing to warn the plaintiff of Mr. Garnett's alleged propensity to do harm, and (3) in violating its own Rule G, which requires employees not to possess narcotics on the defendant's premises.

A

The assault was not committed in the course of the discharge of Mr. Garnett's duties nor in the furtherance of the defendant's business.

Even after drawing all inferences in favor of the plaintiff, the Court is fully convinced that no reasonable person

could find for the plaintiff on the plaintiff's first theory of liability.[1] The only attempt made by the plaintiff to show that the assault was committed within the scope of Mr. Garnett's employment was that he assaulted the plaintiff because plaintiff had just told him to punch his time card early and leave the premises, and because these events, including the assault, transpired on the defendant's premises during the time in which Mr. Garnett was supposed to be working.

The seminal opinion dealing with an intentional tort in a FELA case is *Jamison v. Encarnacion*, 281 U.S. 635 (1930). There, a foreman assaulted the plaintiff for the purpose of "hurry[ing] him about his work." The Supreme Court affirmed the jury verdict holding that an intentional tort committed in the course of the discharge of the duties of the assaulter and in furtherance of the work of the employers' business was cognizable under FELA. The facts of this case do not even approach those in *Jamison, supra*. Here, Mr. Garnett assaulted the plaintiff not to get him to work faster nor in any was to further the business of the defendant. In fact, the assault had just the opposite effect. Even if it were committed in *response* to a valid order by the plaintiff, it thereby frustrated rather than furthered the defendant's objectives. The only act which Mr. Garnett could have done which would have been in "furtherance of the work of the employer's business" was to comply with the plaintiff's orders and punch his card out -- not punch out his foreman.

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[1] This is the test to be applied in deciding whether a Court should grant a directed verdict. This is a higher standard than the test for a new trial motion which is whether the verdict is against the weight of the evidence.

This result is compelled by the Court of Appeals for this Circuit's decision in *Euresti v. Wahsington Terminal Co.*, 280 F. 2d 629 (D.C. Cir. 1960). The Court affirmed a directed verdict for the defendant on the plaintiff's opening statement in a FELA action in which the plaintiff was allegedly assaulted by a fellow employee after the plaintiff insisted that the other not come to work, thereby causing him some loss of pay. Because the alleged assault was made in the interest of the fellow employee and not in the interest of the defendant's business, the plaintiff was not entitled to have the issue go to the jury. This Court finds the *Euresti* case, *supra*, indistinguishable from the one at bar. Here, Mr. Garnett assaulted the plaintiff becasue the plaintiff's order to him would have caused him some loss of pay and the attack was prompted by Mr. Garnett's own desires for revenge.

Therefore, the defendant is and was entitled to a directed verdict on the plaintiff's first theory of liability because the assault upon the plaintiff did not occur while Mr. Garnett was acting within the scope of his duties and it was not in furtherance of the employer's business for one of its employees to assault one of its foremen.

B

The evidence was insufficient to allow the question of the defendant's negligence in hiring, failing to warn, and in violating its own Rule G to go to the jury.

Plaintiff has failed completely in his attempt to prove negligence on the part of the defendant employer. There was insufficient evidence produced by the plaintiff to show any higher standard of hiring than that used by the defendant, or that Mr. Garnett had a propensity for violence, or that the defendant knew or should have known

that Mr. Garnett had a propensity for violence and should have warned the plaintiff, or that the possession of narcotics played any part in the injury sustained by the plaintiff. Thus, the evidence does not even permit a reasonable inference of negligence on the part of the defendant, and this Court should have granted the defendant's original motion for a directed verdict at the close of the plaintiff's case.

To show that the defendant was negligent in hiring Mr. Garnett or in failing to warn the plaintiff of his dangerous propensities, the plaintiff must show that the defendant knew or should have known before the assault or before Mr. Garnett was hired that he had a propensity for violence. There was no evidence that the defendant actually knew that Mr. Garnett had at one time been arrested. There was also no evidence presented that there is a standard of care used by most employers to check out an applicant for employment that is higher than the care used by the defendant in this case. The sole basis for the plaintiff's contention that the defendant should have known of the propensities of Mr. Garnett is the mere fact of the existence of a criminal record indicating a prior arrest for petty larceny and possession of narcotics.[2] Even if this fact could give rise to an inference that the defendant should have known of this arrest, the record

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[2]Plaintiff introduced evidence that Mr. Garnett was violent when arrested *after* the assault and that he was found to possess what *appeared* to be marijuana after the assault. This is not evidence that the defendant knew or should have known of Mr. Garnett's propensities *before* the assault occurred. Furthermore, evidence that Mr. Garnett may have been absent from work for several hours prior to the assault is insufficient to allow an inference that the defendant should have realized Mr. Garnett's propensities for violence. There are many reasons, unconnected with a propensity for violence, which might explain why he was absent.

of a prior arrest (and not a conviction) should not be used to deny an individual a job open to those without such records. *See Utz v. Cullinane*, 520 F. 2d 467, 482 (D.C. Cir. 1975). Furthermore, even if the record revealed a conviction, these crimes are not evidence of a propensity for violence. Merely being a drug user or having stolen some money does not in any way, without more, indicate that that person has any tendencies to cause physical harm to others. To do so would be to engage in sheer speculation and conjecture. Thus, the plaintiff has failed to introduce a scintilla of evidence from which a favorable inference could be drawn that the defendant was negligent in hiring Mr. Garnett or in failing to warn the plaintiff of Mr. Garnett's alleged propensities for violence.

The claim that the defendant violated its own Rule G is sheer nonsense. It was not established by any evidence that Rule G imposed a duty upon the defendant and that the violation of Rule G was causally, or in any way, related to the injury sustained by the plaintiff. Rule G merely states that no employee shall possess any narcotics on the defendant's premises. While this clearly imposes a duty upon the employees not to use drugs, it cannot be said to impose any duty upon the defendant here which was breached because it would be ludicrous to think that the defendant would enact a rule that required it to inspect every employee on every day to ascertain whether that employee possessed narcotics. Moreover, even if Rule G were to be construed so as to impose a duty upon the defendant, the plaintiff has failed to show any causal link between the violation of the Rule and the injury sustained because there is not a scintilla of evidence even suggesting that Mr. Garnett was on marijuana or had recently smoked marijuana at the time of the assault on

the plaintiff. Mere possession of marijuana *after* arrest does not imply or allow us to infer, without more, that he was under its influence at the time of the assault. Therefore, the alleged violation of the Rule, by Mr. Garnett's alleged possession of marijuana, was not shown to have in any way caused or been related to the injury to the plaintiff. Without any causality shown, there is no basis for liability for negligence in the alleged violation of Rule G by the defendant.

III.

CONCLUSION

Accordingly, this Court must direct a verdict in favor of the defendant. The plaintiff did not produce evidence to allow even an inference that the assault occurred in the furtherance of the defendant's business or that the defendant knew or should have known of the alleged dangerous propensitites of Mr. Garnett prior to the assault.

As previously indicated herein, this Court, upon further consideration, is convinced that the defendant's motion for a directed verdict should have been granted at the close of plaintiff's case-in-brief. Nevertheless, notwithstanding the unusual posture of this case arising out of the fact that the Court directed the Clerk, upon receipt of the jury's verdict, not to enter judgment thereon,[3] the Court, after careful consideration of the plaintiff's evidence and drawing all inferences in favor of the plaintiff, finds no basis upon which reasonable persons could infer liability under any of the theories advanced by the plaintiff.[4]

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[3] *See* Fed. R. Civ. P. 58.

[4] Assuming that this case were before the Court in a usual posture (i.e., on a motion for a judgment notwithstanding the verdict and, alternatively, on a motion for a new trial), the Court, in viewing *all* the evidence in deciding the new trial motion, would grant this motion because the verdict is certainly contrary to the weight of the evidence.

Thus, even if judgment had been entered upon the jury's verdict, the Court would have been compelled to grant the defendant's motion for a judgment notwithstanding the verdict; but, in view of the foregoing facts, peculiar to this case, it is not necessary to rule on such motion or on a motion for a new trial. This is so because the record herein does not show even the slightest basis, or provide an inference of liability even under the Federal Employer's Liability Act.

Accordingly, this is why the Court, by order of even date herewith, will direct entry of judgment for the defendant, with a proviso that each party shall bear its own costs.

Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0073

HALBERT D. BROOKS,
Plaintiff,

v.

THE WASHINGTON TERMINAL COMPANY,
Defendant.

RESPONSE TO TRIAL COURT OFFER OF GRANT FOR ADDITIONAL TIME FOR PLAINTIFF TO SUPPLEMENT RECORD PRIOR TO FILING PROPOSED ORDER AND MEMORANDUM OPINION OF THE COURT

Plaintiff respectfully declines the Court's gracious, if somewhat belated, extention of time to file additional argument in reference case and states in support of such response, as follows:

1. This Court correctly denied the defendant railroad's requests for directed verdicts twice during the course of a trial on the merits before a jury.

2. After long, intensive, thorough, instructions on the law, and carefully court prepared written interrogatories which posed the fact and legal issues involved, the jury answered the Verdict Sheet correctly and returned a verdict for the plaintiff in the sum of $80,000.00.

3. After the jury had departed, counsel for the defendant railroad offered to renew his motion for a directed verdict but the Court stated he wanted such renewal in written form and allowed the defendant from the date

of Verdict, October 20, 1977, until October 26, 1977, at the close of business, to file.

4. The Court then allowed plaintiff from October 26, 1977, to October 28, 1977, at the close of business, to reply. The Court expressed the hope that the defendant would present plaintiff with a copy prior to the 26th and such hope was expressed in vain as the defendant *mailed* the copy to plaintiff's counsel which was received on the 27th day of October, 1977, thus reducing plaintiff's time for reply to a matter of hours.

5. The Court also expressed the desire when these dates were established that the matter be disposed of by November 1, 1977.

6. On November 9, 1977, at 5:00 p.m. the Court convened the parties, and without oral argument, presented each side with a proposed unsigned Order and memorandum opinion which granted defendant's Motion for Directed Verdict and stated that "the unusual nature of the case" precluded the need to rule on the Motion NOV and for a new trial, adding in Note 4, Page 7, that he would have granted the Motion NOV had it been before him. (Memorandum Opinion, Page 7.)

7. The Court's characterization of the case as unusual is singularly its own. Until this Court sought to usurp the function of the jury and deny a grievously injured railroad man under remedial legislation enacted for his benefit, not for the benefit or misguided solicitude of the railroads, there was nothing unusual about it.

8. Plaintiff asserts that he was willing to repose his fate in the hands of his peers, despite fair but restrictive rulings on the evidence from beginning to end of the trial, which is mandated by the Federal Employers Liability Act and a host of Supreme Court cases which have construed Section 51 of the Act.

9. The defendant also was willing to gamble on the jury verdict since the pressure to settle at all levels of the proceedings was intense and unrelenting. As the plaintiff steadily yielded to this pressure, the defendant railroad became proportionately implacable and adamant unless plaintiff accepted amounts satisfactory to them and less than the costs of preparation for trial.

10. The Court's Memorandum Opinion states *Euresti v. The Washington Terminal Company* (1960) 108 U.S. Appeals D.C. 81 280 F2d 629, is indistinguishable from the instant case.

This observation is as wrong as this Court's attempt to describe the tool in quotes as a "soft end" tool when in fact the defense counsel referred to it as "a nasty thing", and Garnett, the assailant, was charged with assault with a deadly weapon which was reduced by plea bargaining.

The differences in Euresti and this case, to enumerate only a few, are:

In Euresti:

1) The assailant was not on duty.
2) The assailant was told *not* to report for duty.
3) The assailant came on the premises as a trespasser.
4) The assailant was acting on his own behalf and was not assigned duties by the company when the assault occurred or at any time just prior thereto.
5) The plaintiff's counsel and the trial judge in Euresti had minimal knowledge about the Federal Employers Liability Act and the body of law that had evolved. Neither Section 51 of the Act nor *Jamison v.*

Encarnacion (1930) 281 U.S. 635; 74 L.Ed 1802, was even discussed.

6) The case was not tried on its merits.

7) The appeal theory was never proffered below and the appellate court had no basis to rule, except as it did, on such a record.

To say that the cases are indistinguishable, ignores these record facts:

1) *Unlike Euresti*, the assailant was on duty at all times from 12:00 midnight until the time of the assault on June 10, 1975.

2) *Unlike Euresti*, the assailant was assigned specific tasks which his immediate boss, James Deal, discovered at 1:00 a.m., June 10, 1975, he did not perform.

3) *Unlike Euresti*, Supervisor James Deal permitted Garnett to remain missing while in possession of narcotic drugs which the trial judge says was harmless possession, (Note 2, Pg. 5), although such drugs are labeled dangerous because of their mind altering qualities.

   James Deal had an affirmative duty to protect all other railroad men who were on duty at the time, including plaintiff and the missing man, and he failed to do so. He had an affirmative duty to warn defendant security personnel and plaintiff and he failed to do so.

   This led to actions that were directly related to what happened later when plaintiff had to confront Garnett who had a "dude bag" with narcotics in it on one shoulder and a vicious work tool in the other. The

   testimony was that this was a bizarre appearance for one allegedly working in a dangerous railroad switching yard.

   The "soft end" description of the tool by the trial judge gives some clue that there was, and is, an attempt to downgrade the violence of the act perpetrated on a faithful sixty year old railroad supervisor with thirty-eight years of railroading experience, who is asked now to spend his retirement years with a permanent injury and pain according to uncontradicted and unimpeached medical testimony.

4) *Unlike Euresti*, the jury correctly were asked to resolve the fact issues of negligence, evidence and damages and they resolved these issues in plaintiff's favor using a carefully pointed Verdict Sheet prepared by the Court to respond to them.

Disappointed by the loss of their gamble, the defendant railroad has successfully persuaded the trial court to do a 360° turn from a correct handling of a railroad case to one where, if the law announced in the memorandum opinion prevails, will permit all railroad employees to assault one another and their supervisors with impunity to the railroad on the gound such assault was not in furtherance of the company's business.

On the other hand, supervisors alone could bind the company on the basis of *Slaughter v. Atlantic Coast Line* (1962) 112 U.S. Appeals D.C. 327; 302 F2d 912. The Law is otherwise. No such bizarre result was expressed or intended in *Slaughter* or in *Jamison v. Encarnacion* where this court was allegedly taught not to put such restrictive connotations on the acts of negligence which result in injuries to railroad employees.

But Section 51 of the Act says clearly that any *employee* suffering injury while he is employed by such carrier, is entitled to damages if such injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or *employees* of such carrier."

And *Jamison v. Encarnacion* (1930) 281 U.S. 635 74 L.Ed 1032, says assault is gross negligence. Here the assault was not by a "former employee" as the trial court's proposed memorandum so artfully describes him, (See Pg. 2) but *one who was on duty, caught featherbedding from 1:00 a.m. to 5:45 a.m., in possession of narcotics* in violation of an unenforced company rule, and who lied when confronted by plaintiff, and stated: "Man when I finishes my work I goes to sleep" - comforted no doubt by his dope.

The trial court's insistence that this case is indistinguishable from Euresti, ignores the plain facts of record; ignores the bizarre law that was provoked in Euresti; and furnishes no basis whatever for destroying the remedial funciton of the Federal Employers Liability Act, not to say the health and well being a badly hurt railroad man.

11. Finally plaintiff asserted at the 5:00 p.m. November 9, 1977, meeting that the trial judge, to reach his conclusion, had to reject the whole body of railroad law that has evolved from the original enactment of the remedial legislation and a whole host of railroad cases construing that "humanitarian" act.

What strength does the proposed memorandum of law have in the light of the following pronouncements of law in Federal Employers Liability Act cases?

Rogers v. Missouri Pacific Railroad Co., (1957) 352 U.S. 500. "The test of a jury case is simply whether the proof justify with reason the conclusion that

employer negligence *played any part, even the slightest*, in producing the injury or death for which damages are sought."

Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer *played any part at all* in the injury or death. See also *Webb v. Illinois Central Railroad Co.* (1957) 352 U.S. 512.

Gallick v. B & O Railroad Co. (1963) 372 U.S. 108.

Davis v. B & O Railroad Co. (1965) 379 U.S. 671 85 S. Ct. 636.

Bailey v. Central Vermont Railroad Co. (1953) 319 U.S. 350.

"To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

Plaintiff respectfully points out to this Court to take a case away from a jury after it has been carefully, with almost surgical-like precision, presented to them, does violence to the Act, the intent of the Congress and to the express mandate of the Supreme Court.

The trial court, unlike the jury, sloughed off in a casual note (P.S. Note 2), that Garnett was missing for several hours.

It was the missing for the several hours and the failure to perform his duties that led to the entire assault. The crux of the matter here. *And the employees of the carrier permitted this to happen.*

Nothing the trial court or defense counsel can do will erase this inescapable fact in the record. Nor can the defendant railroad alter the fact that plaintiff was assaulted solely "because he was acting in furtherance of his employer's business." Thus making the railroad switching yard an unsafe place to work. Furthermore, there is substantial evidence that with ordinary diligence the railroad could, and should, have prevented this vicious, unprovoked assault upon an innocent employee who was merely doing what he had always done for thirty-eight years, protect the railroad's property and personnel.

How, one respectfully inquires of this Court, can it be said that no negligence was shown upon the part of the carrier.

To ignore this evidence, is to ignore the Supreme Court when it said in *Lavender v. Kurn* (1946) 327 U.S. 653,:

"Only when there is a complete absence of probative facts to support the conclusion reached by a jury does a reversible error appear." This memorandum opinion makes a mockery of that law and other Supreme Court cases previously cited.

CONCLUSION

Because the proposed Order and Memorandum Opinion denies plaintiff the relief he thought he had obtained from a jury of his peers, plaintiff's counsel has consulted with him and his wife, who was also a good witness to the brutal assault upon plaintiff, since she shared and will share his pain and grief permanently, as to the desirability of filing additional memoranda, attempting to change this Court's mind for a fourth time.

They believe, and counsel concurs, that such efforts would be time consuming, do nothing but obfuscate a clear record, and add to the costs and burdens already imposed upon them. They ruefully note that no such commensurate burden will be imposed on the defendant railroad whose resources to say the least are incomparably better than their own. Nevertheless, they have instructed counsel to note an appeal forthwith once the proposed order and supporting memorandum opinion is filed.

They feel deeply aggrieved by this usurpation of the right to a trial by jury, virtually guaranteed to them by the remedial Federal Employers Liability Act and the Supreme Court cases implementing that Act.

Noting that the Court describes plaintiff as a good witness (therefore a truthful one he presumes) who elicited sympathy, plaintiff acknowledges this observation by the learned trial judge but asserts he did not seek sympathy before the Court. He sought simple justice.

Plaintiff further notes he almost obtained it and he believes that upon review, the appellate tribunals will restore that justice to him.

Respectfully submitted,

/s/ James R. Scullen

James R. Scullen

APPENDIX D

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1025

HALBERT D. BROOKS, APPELLANT

v.

WASHINGTON TERMINAL COMPANY

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 77-0073)

Argued November 30, 1978

Decided January 17, 1979

Judgment entered this date ←

James R. Scullen for appellant.

Richard W. Turner, with whom *Daniel V. S. McEvily* was on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before TAMM and ROBINSON, *Circuit Judges*, and JOHN H. PRATT, *United States District Judge* for the District of Columbia.*

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Halbert D. Brooks appeals from a judgment of the United States District Court for the District of Columbia (Richey, J.) in an action brought under the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. §§ 51-60 (1970). The jury returned a verdict for the plaintiff, Brooks, but the district court refused to enter judgment thereon and granted the renewed motion of the defendant, Washington Terminal Company, for a directed verdict.[1] We affirm.

I

In the early morning hours of June 10, 1975, Brooks, a railroad car foreman for the Washington Terminal Company, was assaulted by Darryl Garnett, an equipment service cleaner who had been employed by the defendant for five months. At 11:45 p.m. on June 9, 1975, Garnett reported to Brooks for work, and Brooks placed him under the supervision of his assistant car foreman, James Deal, for the midnight to 8:00 a.m. shift. Garnett subsequently failed to appear for his 1:00 a.m. meeting with Deal, and failed to perform his duties for the remainder of that night. Deal took no steps to locate Garnett until 5:45 a.m. when Brooks telephoned and inquired into his whereabouts. Thereafter, Brooks and Deal began looking for Garnett. They came upon him walking along the tracks carrying a water hose with a metal end, used in his car cleaning duties, and a woman's blue shoulder bag.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] *See* FED. R. CIV. P. 50, 58.

Brooks asked Garnett where he had been, and Garnett replied, "when I finish my work, I go to sleep." Transcript at 46. Brooks commented that the company did not pay Garnett to sleep and told him to sign out as of 4:30 a.m. and go home for the day. Garnett turned as if to go, but spun around and hit Brooks repeatedly with the hose he was carrying. As Garnett started down the tracks toward his locker, he threatened to get his gun and come back to shoot both of them.

Police employed by the defendant were called and placed Garnett under arrest in the locker room. A search of Garnett yielded what appeared to be marijuana. Garnett was taken to the Superior Court of the District of Columbia and charged with assault. While Garnett was being charged, a Washington Terminal Company policeman checked Garnett's record and found that he previously had been arrested for petty larceny and possession of drugs. Garnett was subsequently dismissed from employment because of the assault and because he had violated a general rule of the defendant that prohibited possession and use of drugs by employees on duty.

At trial, the defendant introduced evidence that it had required Garnett, as an applicant for employment, to obtain a "police clearance" card from the Metropolitan Police Department of the District of Columbia. The police department form had been returned with the notation: "No Record. Name File Search Jan. 7, 1975. Metropolitan Police Dept. Washington, D.C." Joint Appendix at 25.

As another part of the application process, Garnett was required to undergo an examination by defendant's physician. The defendant introduced evidence that its physician routinely checks for needle marks indicating drug use. No evidence was introduced concerning the particular examination of Garnett. On his employment application, Garnett stated he had never taken drugs.

The defendant also introduced evidence that it had checked with Garnett's only prior employer, the District of Columbia Department of Recreation, where Garnett had worked as a musician in a summer program. Garnett's former supervisor evaluated his performance, conduct and attendance as average, and indicated Garnett had been an honest, dependable and generally desirable employee.

II

Section 1 of the F.E.L.A., 45 U.S.C. § 51 (1970), holds common carriers by railroad liable to employees "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." The case in the district court proceeded on two theories of liability that have been developed by the Supreme Court in cases involving intentional assaults by fellow employees.

First, in *Jamison v. Encarnacion*, 281 U.S. 635 (1930), the Court ruled that section 1 of the F.E.L.A., 45 U.S.C. § 51 (1970), applies the principle of respondeat superior, that the term "negligence" in the statute includes intentional torts, and that an assault committed by an employee in the course of the discharge of his duties and in furtherance of the work of the employer's business can serve as the basis for liability under that Act. *Id.* at 639-41.[2] *See generally* Note, *Respondeat Superior and the Intentional Tort: A Short Discourse on How to Make Assault and Battery Part of the Job*, 45 U.

[2] This theory was reflected in the following special question for the jury:

> Do you find by a fair preponderance of the evidence that Mr. Garnett, an employee of the defendant at the time in question, assaulted the plaintiff while acting in the course of the discharge of his duties and in the furtherance of the work of his employer's business, and that such acts caused, in whole or in part, any injury to the plaintiff?

Joint Appendix at 8.

CINN. L. REV. 235 (1976). Second, in *Harrison v. Missouri Pacific Railroad*, 372 U.S. 248 (1963) (per curiam), the Court upheld the "direct negligence" [3] theory of liability, and ruled that a railroad is guilty of negligence if it fails to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct. *Id.* at 249. Significantly, the "direct negligence" theory does not require proof that the intentional tort was committed in furtherance of the employer's business. *Slaughter v. Atlantic Coast Line Railroad*, 302 F.2d 912, 916 n.7 (D.C. Cir. 1962).[4]

The test whether an F.E.L.A. case should be submitted to the jury "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957). Thus, unless "fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury," the case should be decided by the jury. *Id.* at 510. Although we recognize the liberality of this test, we agree with the district court that the evidence produced at trial and the inferences to be drawn therefrom, viewed in the light most favorable to the

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[3] *See* Sowards v. Chesapeake & O. R.R., 580 F.2d 713, 715 (4th Cir. 1978) (per curiam).

[4] This theory was reflected in the following special question for the jury:

> Do you find by a fair preponderance of the evidence that the defendant, Washington Terminal Company, was negligent in its hiring of Mr. Garnett, in failing to maintain a reasonably safe place in which its employees worked, or in failing to warn its employees of the alleged propensities of Mr. Garnett, [and] that any of said negligence caused, in whole or in part, any foreseeable injury to the plaintiff?

Joint Appendix at 8.

plaintiff, did not make out a case for the jury under either theory of liability. *See Hartel v. Long Island Railroad*, 476 F.2d 462, 464 (2d Cir.), *cert. denied*, 414 U.S. 980 (1973).

III

The evidence concerning the assault by Garnett on Brooks suggests only that Garnett was motivated by revenge to further his own personal interests. There is no reason to believe he was acting, or supposed he was acting, in furtherance of the defendant's business. Under these circumstances, the plaintiff's case under the respondeat superior theory was not one for the jury. *See Euresti v. Washington Terminal Co.*, 280 F.2d 629, 630 (D.C. Cir. 1960) (per curiam); *see also Sowards v. Chesapeake & Ohio Railway*, 580 F.2d 713, 715 (4th Cir. 1978).[5]

The doctrine of *Lillie v. Thompson*, 332 U.S. 459, 462 (1947) (per curiam), and *Harrison v. Missouri Pacific Railroad*, 372 U.S. at 249, requires proof of

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[5] We are aware that questions have been raised concerning the scope of respondeat superior under the Federal Employers' Liability Act. *See* Baker v. Baltimore & O. R.R., 502 F.2d 638, 641 (6th Cir. 1974); Ira A. Bushey, Inc. v. United States, 398 F.2d 167, 171-72 & n.8 (2d Cir. 1968); Copeland v. St. Louis-S.F. Ry., 291 F.2d 119, 122-24 (10th Cir. 1961) (Murrah, C.J., dissenting). We need not address these cases because the plaintiff acquiesced in the district court's formulation of the doctrine of respondeat superior. *See* note 2 *supra;* Brief for Appellant at 38-39. On appeal, the plaintiff alleges only that the requirement that an intentional tort be committed in furtherance of the employer's business is not a part of the "direct negligence" test, which relies on foreseeability of intentional conduct. Brief for Appellant at 22-23. We agree. *See text supra* at 5. Although the case of Davis v. Green, 260 U.S. 349 (1922), written by Mr. Justice Holmes, engendered some controversy concerning this issue, we believe *Davis* was based on respondeat superior rather than "direct negligence" principles. *See* Atlantic Coast Line R.R. v. Southwell, 275 U.S. 64, 65 (1927) (Holmes, J.).

reasonable foreseeability of danger from intentional or criminal misconduct before liability is imposed on an employer under the F.E.L.A. for its "direct negligence." *See also Atlantic Coast Line Railroad v. Southwell*, 275 U.S. 64, 65 (1927). The F.E.L.A. does not make a railroad company an insurer of its employees' safety. *See Inman v. Baltimore & Ohio Railroad*, 361 U.S. 138, 140 (1959).

There was no evidence presented in this case from which a jury could infer that the defendant had ignored the consequences of a foreseeable risk of injury such as that suffered by Brooks. Specifically, no evidence was presented from which a reasonable person could conclude that the terminal company knew or should have known, when it hired Garnett or thereafter, that he was a person with a propensity for violence. No evidence was produced to show that the terminal company knew of Garnett's arrest record when it hired him, or that the company's procedures for screening applicants for employment were below the required standard of care. Even if the terminal company did know of Garnett's prior arrests, without convictions, for petty larceny and possession of drugs, it is by no means clear that such knowledge would justify an inference of reasonable foreseeability of violent propensities. Moreover, it cannot be said that Garnett's absence from his duties during the hours preceeding the assault foreshadowed what was to come.[6]

[6] We recognize that in certain circumstances a railroad company may have a duty to search promptly for an absent employee in order "to save him from his probable peril." Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821, 823 (1948) (per curiam). Plaintiff argues that the assault by Garnett would not have occurred if the assistant car foreman, Deal, had searched for and located Garnett when he failed to appear for the 1:00 a.m. meeting. Thus, plaintiff contends, the defendant terminal company is liable for the injury resulting from the assault. We cannot agree. The defendant would be liable only for reasonably foreseeable dangers created by Garnett's absence. *See* text *infra* at 5. It cannot be said that an employee's absence from duties creates a reasonable foreseeability of violent conduct by that employee.

Plaintiff contends that negligence of the defendant could be found from a failure of the company to enforce its rule against use and possession of drugs. We cannot agree. Before failure to enforce a rule could give rise to liability, there must be evidence, as in the case cited by plaintiff, of prior disregard of the rule, which would "warrant[] a finding of the defendant's knowledge of the practice and of its negligence in the performance of its duty to enforce the rule." *Descoteau v. Boston & Maine Railroad*, 101 N.H. 271, 274, 140 A.2d 579, 583 (1958). There was no such evidence in this case.

For the preceding reasons, we conclude that the district court did not err in directing a verdict for the defendant.

Affirmed.